



Office of the Attorney General

State of Texas

November 5, 1996

DAN MORALES

ATTORNEY GENERAL

Mr. Mark G. Daniel
Evans, Gandy, Daniel & Moore
115 West Second Street, Suite 202
Fort Worth, Texas 76102

OR96-2030

Dear Mr. Daniel:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 101592.

The City of Watauga (the "city"), which you represent, received a request for "all documents returned to the city from Harvest Baptist Church as a result of the July 8, 1996 council meeting concerning the Mutual Use Agreement." You claim that the responsive documents are excepted from required public disclosure by section 552.103 of the Government Code. We have considered the exceptions you claim and have reviewed the documents at issue.

Initially, we note that our office has received two citizen complaints concerning requests for this particular information. The requestor in this instance has informed our office that at least one previous request for the Mutual Use Agreement and Conveyance Agreement was made on July 15, 1996. You informed the requestor at that time that the requested information did not exist and you therefore did not seek a decision from this office to withhold the records. Your current request for a decision from this office concerns the request for information dated August 1, 1996. The requestor here asserts that the documents, the proposed Mutual Use Agreement in particular, did exist at the time of the previous request. This circumstance raises a question of fact. Fact issues are not resolvable in the open records process; therefore, we must rely on the representation of the governmental body requesting our decision. See Open Records Decision Nos. 554 (1990), 552 (1990).

We note, however, that it appears from the materials submitted to this office that at least a draft of the Mutual Use Agreement and the Conveyance Agreement did exist at the time of the July 15, 1996 request. If these documents did indeed exist at that time, they are presumed public. The Open Records Act imposes a duty on governmental bodies seeking an open records decision pursuant to section 552.301 to submit that request to the attorney general within ten days after the governmental body's receipt of the request for information. The time limitation found in section 552.301 is an express legislative recognition of the importance of having public information produced in a timely fashion. *Hancock v. State Bd.*

of Ins., 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ). When a request for an open records decision is not made within the time period prescribed by section 552.301, the requested information is presumed to be public. See Gov't Code § 552.302. This presumption of openness can only be overcome by a compelling demonstration that the information should not be made public. See, e.g., Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). Thus, if the Mutual Use Agreement or the Conveyance Agreement existed at the time of the previous request even if only in draft form, they must now be released to the requestor unless they are made confidential by some other source of law.¹

If the requested documents did not exist prior to the earlier request and are not presumed public, we will consider your arguments against disclosure. In that circumstance, you have now properly asked for a decision from this office. Section 552.103(a) excepts from disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The city must meet both prongs of this test for information to be excepted under 552.103(a).

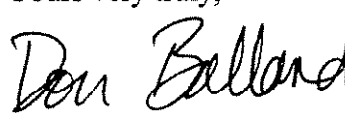
¹You argue that the Mutual Use Agreement and the Conveyance Agreement are deemed confidential by law under the Open Meetings Act as outlined by a previous decision from this office, Open Records Decision No. 259 (1980). Open Records Decision No. 259 (1980) was, however, explicitly overruled by Open Records Decision No. 590 (1991). You may not, therefore, withhold the requested documents pursuant to Open Records Decision No. 259 (1980).

We also note that drafts of documents are subject to required public disclosure under the Open Records Act unless they are excepted under one of the provisions of subchapter C of chapter 552 of the Government Code. See Open Records Decision Nos. 594 (1991), 559 (1990). Additionally, a governmental body must make a good faith effort to relate a request to information which it holds. Open Records Decision No. 561 (1990).

In this instance, you state that two types of litigation are anticipated. You state that the documents relate to a proposed purchase of land. You state that if negotiations are not resolved, the city will institute condemnation proceedings. You state that settlement negotiations continue. After reviewing the submitted materials, we conclude that litigation is reasonably anticipated and that the documents relate to settlement negotiations of the anticipated litigation. You may, therefore, withhold the requested material pursuant to section 552.103 if the material did not exist at the time of the previous request.²

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you questions about this ruling, please contact our office.

Yours very truly,



Don Ballard
Assistant Attorney General
Open Records Division

JDB/ch

Ref: ID# 101592

Enclosures: Submitted documents

cc: Mr. Melvin Tomlinson
5932 Birchill
Watauga, Texas 76148
(w/o enclosures)

²We note, however, that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).